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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-820

GENERAL MOTORS CORPORATION,
*Petitioner*

*v.*

IONE JENKINS,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. .....

GENERAL MOTORS CORPORATION,
*Petitioner*

*v.*

IONE JENKINS,
*Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CURCUIT

Petitioner GENERAL MOTORS CORPORATION, defendant below, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on June 30, 1971.

## OPINION BELOW

The opinion of the Court of Appeals, reported at 446 F.2d 377 (5th Cir. 1971), appears in Appendix I hereto. No opinion was rendered by the District Court for the Northern District of Georgia.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1971. A timely petition for rehearing and rehearing en banc was denied on September 24, 1971. See Appendix III. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

1. Whether the district court and court of appeals applied the proper standard in determining the legal sufficiency of the evidence to present a jury question?

2. Whether, in a case founded on federal diversity jurisdiction, a jury may lawfully infer liability from the opinions of expert witnesses when the opinions are unsupported and contradicted by undisputed physical facts.

## STATUTES INVOLVED

United States Constitution, amendment VII:

> In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Code, Title 45, Section 51 (Act of Apr. 22, 1908, c.149, § 1, 35 Stat. 65) (in pertinent part):

> Every common carrier by railroad while engaging in commerce between any of the several States

> or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

## STATEMENT OF THE CASE

Jurisdiction of this common law action in the district court was invoked because of diversity of citizenship, the plaintiff being a citizen of Georgia and the defendant being incorporated in Delaware with its principal place of business in Michigan. The action arose out of an automobile accident and damages were sought from the automobile manufacturer for an alleged defect in the left rear suspension system. After denying the manufacturer's motions for directed verdict, the trial court submitted the case to the jury which returned a verdict for $425,000. Judgment was entered on the verdict despite petitioner's motions for judgment notwithstanding the verdict and new trial.

The core of the dispute, both on petitioner's trial motions and on appeal, is the legal insufficiency of the evidence to support the verdict. Petitioner has urged throughout the proceedings that a verdict cannot be based solely on expert opinion when (a) the opinion is contradicted by the undisputed physical evidence and (b) the jury was required to engage in unre-

strained speculation in order to supply missing evidentiary elements necessary to establish the cause of action. The dispute turns on the role of court and jury in the federal system when deciding claims arising under state law.

## REASONS FOR GRANTING THE WRIT

### 1.

### CIRCUIT COURTS OF APPEAL ARE DIVIDED ON THE STANDARD TO BE APPLIED IN DETERMINING THE LEGAL SUFFICIENCY OF THE EVIDENCE IN DIVERSITY ACTIONS

Opinions of the circuit courts of appeal evidence a serious split among themselves and, in some instances, between opinions within a given circuit on the question whether a federal court in a diversity action should apply a federal or state test in determining the legal sufficiency of the evidence to raise a jury question. Among those circuits which purport to apply a federal standard, there is further division of opinion on the delineation of the proper federal rule.

A number of circuits historically have applied a state standard. The Second and Sixth Circuits appear generally to have relied on state law, see, *e.g.*, *Calvert v. Katy Taxi, Inc.*, 413 F.2d 841, 846 (2d Cir. 1969); *DeGarmo v. City of Alcoa*, 332 F.2d 403, 404 (6th Cir. 1964), although both courts have now created additional uncertainty by questioning, without resolving, their own past approaches, *Simblest v. Maynard*, 427 F.2d 1 (2d Cir. 1970); *Lones v. Detroit, T. & I.R.R.*, 398 F.2d 914, 918 (6th Cir. 1968), *cert. denied*, 393 U.S. 1063 (1969). The Third Circuit has decisions on both sides of the question, *compare Hanley v. Heckler*, 380 F.2d 986 (3rd Cir. 1967), *with Walsh v. Miehle-Goss-Dexter, Inc.*, 378 F.2d 409 (3d Cir. 1967), and has only recently acknowledged that "in the wake of [the reluctance of the Supreme Court to determine the question] our decisions have displayed aberrant

tendencies." *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969). That court has now joined the Second and Eighth Circuits in avoiding the question, see, *e.g.*, *Simblest v. Maynard, supra; Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968); *Rumsey v. Great Atlantic & Pac. Tea Co.*, 408 F.2d 89 (3d Cir. 1969) (*en banc*); *Kridler v. Ford Motor Co.*, 422 F.2d 1182 (3d Cir. 1970). The Seventh Circuit also has decisions on both sides of the question. *Compare Reitan v. Travelers Indemnity Co.*, 267 F.2d 66 (7th Cir. 1959), *with Gullett v. St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100 (7th Cir. 1971). In the Fourth, Fifth, Ninth and Tenth Circuits, it is stated that federal law governs, *Wratchford v. S. J. Groves & Sons*, 405 F.2d 1061 (4th Cir. 1969); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*); *Safeway Stores v. Fannan*, 308 F.2d 94 (9th Cir. 1962); *Kiner v. Northcutt*, 424 F.2d 222 (10th Cir. 1970), although even courts in this group occasionally revert to state law, *e.g.*, *Union Pac. R.R. v. Hormaechea*, 418 F.2d 990 (9th Cir. 1969); *Union Pac. R.R. v. Lumbert*, 401 F.2d 699 (10th Cir. 1968).

Those circuits which have attempted to apply federal law have encountered substantial difficulty in determining the nature of the standard and in applying the standard to cases before them. The clearest issue has been whether federal diversity cases are governed by the legislative standard applied in Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, cases, or by some other standard to be articulated by federal courts. *Compare, Wratchford v. S.J. Groves & Sons, supra, and Lones v. Detroit, T. & I.R.R., supra, with Boeing Co. v. Shipman, supra, and Missouri-K.-*

*T. Ry. v. Hearson*, 422 F.2d 1037 (10th Cir 1970). Even those circuits which have purported to resolve this question have continued to allow clouds of uncertainty to remain.

The Fifth Circuit provides a good example. In 1967, the court unequivocally held the FELA standard to be the applicable rule in diversity cases. *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir. 1967). This standard was uniformly applied in the Fifth Circuit for a period of slightly more than one year, when *Boeing Co. v. Shipman*, 389 F.2d 507 (5th Cir. 1968), reached the court. The *Boeing* case was originally decided on the basis of *Planters*, but upon reconsideration *en banc* the Fifth Circuit rejected *Planters*, overruled its progeny, and, in a scholarly opinion, proceeded to promulgate a new test for application in diversity cases.[1] Judge Rives dissented in a forceful and equally scholarly opinion.

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1. Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*), *affirming on other grounds*, 389 F.2d 507 (5th Cir. 1968):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case sub-

Subsequent to the *Boeing en banc* opinion, which appeared finally to resolve this issue in the Fifth Circuit, even this court has allowed uncertainty to reappear. Notwithstanding its firm rejection of the FELA standard for diversity litigation, and the express overruling of *Planters* and its progeny, the court has continued to rely on *Lavender v. Kurn*, 327 U.S. 645 (1946), the leading exposition of the FELA standard, as well as the Fifth Circuit's own expressly-overruled statements of the FELA rule. See, *e.g.*, *Alman Bros. Farm & Feed Mills, Inc. v. Diamond Laboratories, Inc.*, 437 F.2d 1295 (5th Cir. 1971); *Anderson v. Eagle Motor Lines, Inc.*, 423 F.2d 81 (5th Cir. 1970); *United States v. 41 Cases, More or Less*, 420 F.2d 1126 (5th Cir. 1970); *Guillory v. Aetna Ins. Co.*, 415 F.2d 650 (5th Cir. 1969). It is particularly significant that this has occurred in the circuit which has made perhaps the most earnest effort to clarify the standard.

This confusion is also present in the Fifth Circuit's decision in the instant case. The court *sub silentio* abandoned the *Boeing en banc* opinion and reverted to the disapproved *Planters* FELA rule in three important respects:

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mitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

(1) The evidence to be reviewed was limited to the "evidence and all inferences most favorable to the party against whom the motion [for directed verdict and j.n.o.v.] is made," Appendix AI—4, thereby rejecting the *Boeing* rule that "the Court should consider all of the evidence — not just the evidence which supports the non-mover's case." *Boeing Co. v. Shipman*, 411 F.2d at 374 & 375 n. 16.

(2) The scope of permissible jury inferences was expanded from the implicit *Boeing* limitation of those inferences reasonably supported by the evidence to the less restrictive FELA rule which has been recognized as allowing significantly more jury freedom than in common law negligence actions. See *Missouri-K.-T. Ry. v. Hearson*, *supra*, at 1040; *Boeing Co. v. Shipman*, 411 F.2d at 371; *Chicago, R.I. & P.R.R. v. Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964).

It is at this point that the opinion in the instant case most glaringly departs from the *Boeing* rule. Of the two cases cited by the court below as authority for the standard applied, one, *Equitable Life Assur. Soc'y of the United States v. Fry*, 386 F.2d 239 (5th Cir. 1967), had been expressly overruled in *Boeing* as applying the disapproved FELA rule, and the other, *Lones v. Detroit, T. & I.R.R.*, 398 F.2d 914 (6th Cir. 1968), had applied the FELA rule of *Lavender v. Kurn*, *supra*. A third case relied upon in the instant opinion, *Remington Arms Co. v. Wilkins*, 387 F.2d 48 (5th Cir. 1967) had also been overruled in *Boeing* because it had applied the FELA standard.

(3) The standard applied in the instant case was expressed as "an absence of probative facts to support the conclusion reached by the jury." This expression is virtually identical to the FELA rule as defined in *Planters* and *Lavender v. Kurn*: "A complete absence of probative facts to support the conclusion reached." *Boeing* had expressly rejected this standard. *Boeing Co. v. Shipman*, 411 F.2d at 370.

Petitioner respectfully submits that the Fifth Circuit adopted the proper rule in *Boeing Co. v. Shipman*, 411 F.2d at 374-75, but in this case as well as others decided subsequent to *Boeing* the court has abandoned its own *en banc* determination and reverted to an application of the FELA standard of *Lavender v. Kurn*. The tribulations of the Fifth Circuit in dealing with this issue are typical of those encountered by other circuits. Courts, commentators and litigants alike have recognized the need for resolution of the question by the Supreme Court. See 5A MOORE, FEDERAL PRACTICE ¶ 50.06, at 2348 (2d ed. 1971); 2B BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 1075, at 400-04 (Wright ed. 1961). It is submitted that until the Supreme Court authoritatively speaks to the issue, the division among the circuits, and among opinions within a given circuit, will continue unabated.

2.

## DEFINITION OF THE RULE GOVERNING THE FUNCTIONS OF JUDGE AND JURY IN DIVERSITY LITIGATION IS OF GREAT PUBLIC IMPORTANCE

This Court is well aware of the large volume of civil diversity litigation in federal district courts of the Nation. There is, of course, an overriding need for federal uniformity in the disposition of these matters, and central to their resolution is a determination, pursuant to a reasonably definite rule, of the legal sufficiency of the evidence to prove a claim.

At present, a given set of evidentiary facts would be legally sufficient in one circuit, but insufficient in another. While the nature of federal diversity jurisdiction dictates that substantive elements of the cause of action may vary depending upon applicable state law, the quantum of proof required to sustain those elements in federal court should not depend upon the circuit in which the action is filed, or, in some instances, the state from which the claim arose.

Lower federal courts, litigants and potential litigants are affected by the current lack of clarity and uniformity of standard. Valuable judicial time and energy is repeatedly expended by courts of appeal and district courts alike seeking to review and resolve this troublesome issue.

Without a definitive statement from this Court the issue will continue to be raised by litigants, with continuing uncertainty as to outcome. The significance of the question is not limited to litigants, but extends

to potential litigants as well — parties seeking to resolve their differences without resort to litigation are guided in their negotiations by the standard to be applied to determining the legal sufficiency of the evidence. Persistent uncertainty as to the standard contributes to an inability to settle civil disputes privately without recourse to the courts.

Finally, the presence of the Seventh Amendment guarantee of the right of trial by jury injects issues of constitutional proportions into any rule which seeks to regulate the respective functions of judge and jury in a federal court. Although petitioner maintains that it is entirely proper and, in cases such as the present one, required that the court prevent unsupported speculation on the part of the jury, it must be recognized in formulating any standard for determining the legal sufficiency of evidence, that the Seventh Amendment must stand as the benchmark.

With the presence of constitutional considerations, and the demonstrated confusion on the part of the lower courts on this issue, which is central to all diversity litigation and to much federal question litigation as well, petitioner urges this Court to review the question.

3.

## THE ISSUE IS RIPE FOR DECISION IN THE INSTANT CASE

This Court has declined in the past to establish a standard for review of verdicts in diversity cases. See *Mercer v. Theriot*, 377 U.S. 152 (1964); *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959). Petitioner

does not intend to suggest through this petition that the Supreme Court burden itself with review of questions limited to the sufficiency of the evidence to support a verdict. Petitioner does contend, however, that a decision by this Court on the questions raised here will alleviate the considerable confusion among the lower courts on the standard to be applied in federal diversity litigation. Since the decisions in *Mercer v. Theriot* and *Dick v. New York Life Ins. Co.*, there has been substantial activity by the lower federal courts developing all facets of the question and solidifying the issues upon which the division among the circuits turns. Petitioner submits that the state of the law is now such that this Court should accept this petition and determine the issue, thus avoiding additional expenditure of judicial resources in efforts to alleviate the growing uncertainty on this point.

The question is timely for another reason directly related to the merits of the issue. The substantive limits of tort liability are rapidly expanding in many areas of the law, products liability included. A defendant, or potential defendant, must, of course, tailor its conduct in such a way as to meet its responsibilities under the expanding concepts of liability. But, as the areas of liability expand, it becomes all the more important to protect the rights of a defendant to fair treatment in the hands of a jury. Such fairness requires vigilance on the part of the trial and appellate courts to insure that juries are not permitted to engage in unrestrained speculation as to the inferences which may be drawn from the evidence. Without this protection a defendant in products liability litigation becomes a virtual insurer for all damage arising out

of the use of its products. One element of the protection of a defendant's rights is the delineation of a fair and workable standard for determining the legal sufficiency of the evidence. Petitioner contends that the Fifth Circuit took an appropriate step in this direction in its *Boeing en banc* opinion, but subsequent cases, including the present one, indicate abandonment of the standard determined there.

Implicit in the opinion of the Fifth Circuit in this case is a refusal, in a case involving great quantities of evidence including "hundreds of photographs, exhibits and the movies," Appendix AI—6, to review the *quality* of the evidence to determine whether a jury could fairly infer liability. This approach not only denies effective review to the parties, it encourages future litigants to fill the trial record with such overwhelming amounts of evidence that a reviewing court will be tempted to conclude that somewhere in the massive record before it there must be evidence to support the verdict. At a time when all courts, and federal trial courts in particular, are threatened with docket breakdowns, the bar should not be encouraged, even implicitly, to so lengthen the trial as to make it unlikely that a reviewing court will be able to analyze all the evidence to determine whether the verdict is supportable. Petitioner submits that the promulgation of a workable standard of review under which lower federal courts could realistically analyze the evidence would tend to stem the trial tactic of needlessly burdening trial records with a large volume of nonprobative evidence.

This case provides a good example of the problem. Although the basic *facts* of the accident were undis-

puted, and the extent of plaintiff's injuries was uncontested, the trial extended over more than two weeks. Briefly stated, the evidence showed that an automobile left the highway and, while traveling along the shoulder of the road, struck a concrete culvert with such force that one of the front wheels was driven through the floorboard into the passenger compartment. It was undisputed that the left rear wheel also struck the culvert and, after the impact, that wheel was found to be torn away from its mountings and canted outward.

The plaintiff alleged a specific theory of negligence and causation whereby a nut on one of the four bolts holding the left rear wheel in place was loose and in the normal course of driving fell from the car. The bolt then fell out and it was alleged that this allowed the wheel to swing rearward causing the car to be pulled off the road. The case was tried on this theory, and *res ipsa loquitur* was stipulated as inapplicable.

Plaintiff's evidence of liability consisted of the testimony of the driver, herself (the passenger), a highway patrolman and several experts. Plaintiff's experts asserted the theory described above based on examination of the automobile some time after the accident occurred. It is demonstrable from the record that not even a scintilla of evidence, other than the bare assertions of plaintiff's experts, support the verdict. Indeed, the physical evidence introduced by plaintiff, consisting of various parts of the automobile, positively contradicts the conclusions of plaintiff's experts.

On the other hand, defendant introduced extensive testing which demonstrated that plaintiff's theory was

physically, mathematically and scientifically impossible. Defendant also introduced a fragment of the bolt which allegedly fell from the car prior to impact, which fragment was positively identified as having been in the car, and which was sheared off at precisely the point at which it would have sheared had it been in the car at the time of impact. Defendant's evidence was undisputed and unimpeached.

Petitioner has argued throughout, on motions for directed verdict, judgment notwithstanding the verdict, new trial and on appeal that in order for the jury to find for plaintiff it must disregard all of defendant's evidence, all of the physical evidence, and portions of the testimony of the driver, the plaintiff and highway patrolman. To find for plaintiff the jury was required to accept the conclusion of plaintiff's experts and speculate as to the facts to support those conclusions.

Petitioner submits that under no fair rule for determining the sufficiency of the evidence, and certainly not under a proper application of the Fifth Circuit's *Boeing* rule, can unsupported conclusions of expert witnesses, which are contradicted by undisputed physical facts, be deemed sufficient to raise a jury question.

In short, this case presents the issue of delineation of an appropriate standard for determining the legal sufficiency of the evidence in federal diversity litigation and arises at a time when the lower federal courts have developed the legal considerations touching the issue to a point that further struggle becomes an inefficient expenditure of judicial resources.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 29084

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IONE JENKINS,

Plaintiff-Appellee,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

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*Appeal from the United States District Court for the Northern District of Georgia*

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(June 30, 1971)

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Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Ione Jenkins was severely injured when the Corvair automobile in which she was a passenger suddenly veered off the road and landed in a ditch on April 15, 1962. She predicated her action against General Motors Corporation on the grounds of negligent failure to properly tighten and inspect a nut on a bolt in the left rear suspension system. A jury returned a verdict for plaintiff and awarded damages in the sum of $425,000 and judgment was en-

tered thereon. On this appeal appellant raises (1) the insufficiency of evidence to submit to the jury, (2) the alleged error of the district court in excluding certain evidence regarding one of appellee's expert witnesses, and (3) the alleged error in denying appellant's motion to exclude certain testimony of Ione Jenkins.

The evidence in the case indicates that appellee and her date, Billy Mixon, each sixteen years of age, left a drivein theater near Swainsboro, Georgia on the night of April 15, 1962, and headed toward Swainsboro on a straight and level gravel-top asphalt road. Mixon was driving the two months' old 1962 Corvair which registered about 2200 miles on its odometer. Having traveled approximately 1800 feet, the car suddenly veered and pulled to the left, became "uncontrollable", slammed into a concrete culvert off the left shoulder of the road and turned over into a ditch. As a result appellee Jenkins was permanently paralyzed in a major portion of her body.

Testimony of appellee's witnesses, including the trooper who investigated the accident scene, established that there was no evidence of excessive speed, of use of alcoholic beverages, or of improper driving. Appellee Jenkins and Billy Mixon, the only eyewitnesses to the occurrence, testified that they were driving along when the automobile suddenly veered to the left and became uncontrollable. Mixon tried to counteract this by turning the wheel fully to the right. In response to Miss Jenkins' inquiry, Mixon cried out "I have lost my steering." Mixon testified that he tried to

apply his brakes, but that when he hit them, the pedal went to the floor board and he got no braking action.

Appellee's theory of the cause of the accident was that a nut on a bolt in the left rear suspension system was inadequately torqued during assembly at the appellant's factory and that under normal operation conditions this nut worked loose and dropped off, allowing the bolt to drop out. The absence of this bolt and the concomitant additional stresses and strains on the remaining adjacent bolt caused this second bolt to "wallow out" the hole in which it was placed during normal operation of the car. Consequently, at the time of the accident, this second bolt pulled through leaving the components unsecured and causing the left rear suspension assembly to sweep back, canting the wheel outward and to the rear. Appellee contends that this not only created the sudden pull to the left, but also resulted in a loss of a portion of the brake assembly and the subsequent brake failure.

I.

The principal question in this case is presented by appellant's contention that the district court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. Appellant vigorously asserts that the damage to the rear suspension system was the result, not the cause, of the accident, and that the theory developed by appellee is so speculative that the jury should not have been permitted to draw the series of inferences required to establish the ultimate fact of appellant's negligence.

Generally, a directed verdict is granted in two types of situations, neither of which is present in the case at bar. "First, where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense. . . . Second, where there are no controverted issues of fact upon which reasonable men could differ." 5 Moore, Federal Practice, ¶50.02[1] (2d Ed. 1969). On motions for directed verdict and J.N.O.V. the trial court, and a reviewing court, must view the evidence and all inferences most favorable to the party against whom the motion is made. *Boeing v. Shipman*, 411 F.2d 365 (5th Cir., 1969);[1] 2B Barron & Holtzoff,

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[1]The *Boeing* case firmly established that for diversity cases in this Circuit a Federal and not a State test for sufficiency of evidence to create a jury question would be used, and that test is:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach difference conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evi-

Federal Practice and Procedure, § 1075, p. 378 (Wright Ed. 1961).

Appellant asserts that the facts are "equiponderant" as to what caused the automobile to strike the culvert. In support of its position at trial, appellant introduced numerous films, exhibits and expert opinion testimony concerning the degree of tightening of the bolt, the shape of the pull-through hole, and of tests conducted on Corvair automobiles. A witness testified that he found the "missing" bolt forty-one feet away from the scene of the accident, and according to appellant's experts the bolt was sheared at impact. This was contrasted with the expert testimony utilized by appellee supporting her theory of the case, including evidence of the condition of the brakes, of rotational marks on the left rear axle indicating it was out of position before impact, and of the condition of the left rear wheel, found "canted out" after the accident but with evidence of only minimal damage from impact.[2]

It all boils down to a battle of experts and, as such, the trial court did not err in submitting the case to the jury. The jury was allowed to inspect and even handle the various components of the rear suspension assembly involved, including the "wallowed out" hole

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dence and inferences, and determine the credibility of witnesses." 411 F.2d at 374-75.

[2]Appellant urges that the theory of appellee's experts was contradicted by the failure of the two eyewitnesses to feel anything mechanically wrong prior to the accident. We reject this argument in view of their testimony concerning Mixon's attempt to turn the wheels and to obtain braking action to no avail. The jury was authorized to conclude that the failure of which they spoke did in fact occur.

and the "missing" bolt. In addition, they viewed the hundreds of photographs, exhibits and the movies that were shown. The jury was not bound by the appellant's evidence, nor forced to accept the testimony of its experts, even if uncontradicted. *Remington Arms Company, Inc. v. Wilkins*, 387 F.2d 48, 54 (5th Cir., 1967); *American Cyanamid Company v. Fields*, 204 F.2d 151, 153 (4th Cir., 1953). The jury was authorized to make reasonable inferences even if some speculation and conjecture was required. *Lones v. Detroit, Toledo & Ironton Railroad Co.*, 398 F.2d 914, 919 (6th Cir., 1968); *Equitable Life Assur. Society of the United States v. Fry*, 386 F.2d 239, 248 (5th Cir., 1967). We reject appellant's contention that there was an absence of probative facts to support the conclusion reached by the jury.

Appellant, however, cites several auto accident cases which it contends establishes that the evidence was insufficient to allow the instant case to go to the jury. Each case of this nature turns on its own facts, and facts differ. Many courts have been faced with similar conflicts in evidence under circumstances parallel to those in the case at bar. For example, in *Kanatser v. Chrysler Corporation*, 199 F.2d 610, 616-17 (10th Cir., 1952), cert. denied 344 U.S. 921 (1953), the court stated:

> "The allegation of negligence in this case was to the effect that the Chrysler Corporation sold and delivered to the petitioner a new Dodge automobile with a defective 'tie rod'; that while riding in the same upon the highway five days after the purchase and delivery, the defective tie rod failed, causing the accident

and damages complained of. The verdict of the jury is necessarily based upon a finding of negligence, as alleged. The first assignment of error is that on the evidence, the trial court should have directed a verdict for the respondent for lack of sufficient evidence to show that the tie rod was defective when the car was sold and delivered, or that the accident was caused from the failure of such alleged defect.

"There was competent evidence to the effect that while the car was traveling upon the highway at a reasonable rate of speed, the left front wheel suddenly turned toward the inside of the highway causing a collision with an oncoming car. It was also shown that the left tie rod was broken, and there was expert testimony to the effect that it was partially broken and in a defective condition before the accident occurred. While there was competent evidence to the contrary, the petitioner's proof was entirely sufficient to present issuable facts for the jury."

In *Hupp Motor Car Corporation v. Wadsworth*, 113 F.2d 827, 828 (6th Cir., 1940), a six weeks' old car traveling at 35 miles per hour on a dry level cement road suddenly veered and swerved back and forth and finally struck a culvert killing its occupant. After the accident, "it was found that the pitman arm of the steering gear, which should be held upon the ball stud of the steering drag link by a castellated nut secured by a cotter pin, was disconnected and that the nut and

cotter pin were missing." Despite the conflict in expert testimony and the parties' theories concerning causation, the court found that:

> "the jury might rightfully have inferred that the pitman arm had been loose. It was testified that otherwise no wear would have been shown on the taper.... Two experts ... testified that evidently the nut had been working loose, and stated as their opinion that no cotter pin had ever been properly inserted, if inserted at all, in the cotter pin hole." 113 F.2d at 829.

The defendant's motions for directed verdict and J.N.O.V. were denied.

More recently, in *Nevels v. Ford Motor Co.*, 439 F.2d 251 (5th Cir., 1971), this court was faced with an automobile accident case involving a 1967 Mustang in which plaintiff claimed that Ford Motor Company was negligent in the manufacturing or assembling of the steering mechanism because a retaining nut was not properly torqued or secured with a sealing compound:

> "The experts were diametrically opposed concerning the condition of the splines and the retaining nut, as well as the cause of the conditions found. On the one hand, it was unequivocally stated that so long as the retaining nut was on the shaft, even in a loose condition, there could be no slippage of the shaft and no wear on the splines — that the splines showed no evidence of wear but showed only damage un-

> doubtedly caused by the impact of the accident. On the other hand, it was stated, equally explicitly, that the splines showed considerable wear caused by the shaft slipping because the retaining nut was loose. This condition, it was said, made the steering virtually inoperable." 439 F.2d at 254.

Nevertheless, the court held:

> "The jury could have fairly concluded from all of the evidence, though disputed, that Ford was negligent in not having tightened the wheel retaining nut by applying a proper torque on it, and in failing to properly secure the net to the shaft by a sealer or on an epoxy material. No error was committed in submitting the case to the jury. Indeed, it would have been error to do otherwise." 439 F.2d at 256.

The trial court in the instant case likewise correctly overruled appellant's motions for directed verdict, J.N.O.V., and for new trial.

II.

Appellant next claims that the district court erred in precluding appellant from introducing, for purposes of impeachment, evidence that one of the appellee's expert witnesses was under indictment for perjury. It is clear, however, under the law of Georgia and in the Federal courts that it is improper for impeachment purposes to show the accusation, arrest,

or indictment for a crime to use against a witness in a civil or criminal case. The courts of Georgia have spoken on this subject a number of times. See e.g., *Smallwood v. State*, 95 Ga. App. 766, 98 S.E.2d 602, 604 (1957); *Davis v. State*, 60 Ga. App. 772, 5 S.E.2d 89, 90 (1939); *Beach v. State*, 38 Ga.App. 265, 75 S.E. 139. The well settled rule in Federal courts has also been to require that a conviction be had in order to undermine the trustworthiness of a witness. *Rizzo v. United States*, 304 F.2d 810, 831 (8th Cir., 1962); *Hudson v. United States*, 387 F.2d 331, 332 (5th Cir., 1967); *Roberson v. United States*, 249 F.2d 737, 742 (5th Cir., 1957); *Wanamaker v. Lewis*, 173 F.Supp. 126, 131 (D.D.C., 1959).

Appellant has presented no valid reason to depart from this well established principle and the court below properly sustained appellee's objection to the proffered cross examination of witness Doyle.

III.

Finally, appellant contends that the court below erred in ruling that appellant waived its objection to certain testimony of appellee Ione Jenkins and in denying appellant's motion for mistrial, or for reprimand of appellee's trial counsel in the presence of the jury.

The essence of appellant's argument is that the jury was profoundly influenced by the physical appearance of Miss Jenkins in the court room in her wheel chair or on a stretcher, and that her condition was accented by part of her testimony concerning bearing an illegitimate child while paralyzed, her

desperate search for help, her lack of financial support, and the degree of her disability and discomfort. Appellant alleges that much of this information was elicited by the leading questions of Miss Jenkins' trial counsel.

As appellant concedes, much of this testimony was corroborative and relevant to the medical evidence relating to her claim for disability, pain and suffering, and mental anguish. Her testimony about not having a home or people to care for her was relevant in the sense that this indicated she often required hospitalization to receive proper medical attention. During and immediately following the long direct examination of Miss Jenkins, appellant's counsel interjected no objections and made no attempt to gain the trial judge's attention. Appellant's trial counsel then declined to exercise his right of cross-examination and asked to make a motion outside the presence of the jury. It was at that time he sought a mistrial or the ruling out of the evidence or a reprimand of appellee's trial counsel before the jury.

During an ensuing colloquy between the court and appellant's counsel, the court acknowledged that there were some items in the testimony of Ione Jenkins that he would have excluded if an objection had been made. He agreed to make a requested charge to the jury on the question of sympathy.[3] Appellant's counsel ad-

[3]The court below did give the charge climactically at the end of its long set of instructions. The charge was as follows:

"Now, ladies and gentlemen, certain evidence has been admitted in this case indicating not only the

mitted to the judge that he had made a tactical decision by sitting silently and not objecting to any of the testimony. He told the court that he was "prepared to live with" his decision.[4]

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physical condition of the Plaintiff, but also that she is and has been since the time of the accident, unable to take care of herself and her child, and that she has no family or other persons upon whom she can depend. This would naturally create in your mind sympathy for the plaintiff.

"I charge you, however, that in deciding this case, you should not be influenced in any way by sympathy. Neither sympathy nor prejudice or favoritism for or against either party should in any way influence you in reaching your verdict.

"The sole question for your consideration is whether the accident in this case was caused by the failure of the Defendant to exercise ordinary care in the manufacture and inspection of the automobile. And any feelings of sympathy you may have are not to be considered in your deliberations and determinations on this question."

[4]The colloquy between the court and appellant's trial counsel included the following:

"THE COURT:

Well, there were some things that were, some areas of inquiry and a response which I think are not involved in this case. But I think through that it was the duty of counsel, if he cared to do so, to object to them. And I think many of the things of which he complains — for example, how she picked up her pocketbook, how she would eat something, how she does this, that and the other, are the very essence of pain and suffering.

Now I don't know about the, her, her financial situation. I agree that has nothing to do with this case. The financial condition of her family has nothing to do with this case.

And there were certain other items that have nothing to do with this case. And I can understand that Mr. Kirbo was confronted with a tactical decision.

MR. KIRBO:

Right, sir.

THE COURT:

Appellant's attempt to fault the trial judge when most of the testimony in question was relevant and admissible is unavailing. Once again, appellant has provided us with no meritorious reason to depart from the general rule that a timely objection is necessary to bring to the trial court's attention alleged errors in the conduct of the trial. As this court stated in *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F.2d 541, 551-52 (5th Cir., 1968):

> "Rule 46 of the Federal Rules of Civil Procedure states, '[I]t is sufficient that a party, at a time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor * * *.' This implies, however, that such an exposition must be made. This rule is ' "not a mere technicality, but is of substance in the administration of the business of the courts." ' Revlon, Inc. v. Buchanan, 5 Cir., 1959, 271 F.2d 795, 798, 81 A.L.R. 2d 222.
>
> "This rule is simply a codification of the prior practice of the federal courts. Johnston v.

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But when you made your tactical decision, you have to live with it, don't you?
MR. KIRBO:
Right, sir.
THE COURT:
I mean, that's —
MR. KIRBO:
I'm [illegible]pared to live with it, too, Judge."

Reily, 1947, 82 U.S.App.D.C. 6, 160 F.2d 249. The Supreme Court long ago held:

> "'Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances, that can be done.' Noonan v. Caledonia Gold Mining Co., 1887, 121 U.S. 393, 400, 7 S.Ct. 911, 915, 30 L.Ed. 1061."

See also *Rowe v. Pennsylvania Greyhound Lines*, 231 F.2d 922, 925 (2nd Cir., 1956), cert. denied 351 U.S. 984.

The Georgia courts, as a general rule, also require that on a motion for new trial the movant must show that he objected to the evidence at the time it was offered. *Phillips v. State*, 108 Ga.App. 540, 133 S.E.2d 708 (1963); *Holloway v. State*, 101 Ga.App. 585, 114 S.E.2d 538 (1960).

In *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir., 1967), appellants were urging that a mistrial should have been granted because of prejudicial statements during final argument by plaintiffs' counsel. This court quoted from Judge Hutcheson's opinion in *Maryland Casualty Co. v. Reid*, 76 F.2d 30, 33 (5th Cir., 1935):

> "At common law and by statute, the federal District Judge is charged with the duty of

> granting a new trial in a jury case where, in his opinion, it went unjustly and injuriously out of bounds. This court, as to law cases, is a court of error. We do not retry the case. We review the record made in it for reversible error, error by the judge, in conducting or failing to conduct the trial, which has, by permitting the case to get out of bounds, prejudiced the just result. * * * Abstract inerrancy is hardly possible in the trial of a case in the federal court; it is never an essential to a valid trial there. Jennings v. United States (C.C.A.) 5 Cir., 73 F.2d 470; Community Natural Gas Co. v. Henley (C.C.A.) 5 Cir., 54 F.2d 59. Too much is said and done about too little in the heat and hurry of a trial, for it all to be important. Things of no moment in their transpiring are not made momentous merely by making record of them. Therefore, though the District Judge is an administrator primarily charged with the just conduct of the trial, he may not ordinarily be put in error merely because an aberration from trial rules has occurred. It is the duty of counsel by objection to call such threatened or actual departure to the judge's attention, and invoked his corrective action, and, if overruled, to make it appear that prejudice has resulted."

The court in *Har-Pen* then went on to hold that "[t]he close supervision repeatedly demonstrated by the trial judge in the present case corrected the error to the extent correctible; and the trial judge was within his discretion and his peculiar competence in assessing the

error as not sufficiently inflammatory to call for a new trial." 378 F.2d at 715.

Likewise, in the instant case, we find that the trial judge did not abuse his discretion in failing to grant appellant's motions with respect to the testimony of Ione Jenkins, and that he did everything in his power to ensure a fair jury trial.

The judgment of the district court is AFFIRMED.

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# APPENDIX AII

AII—1

IN THE

# UNITED STATES COURT OF APPEALS

## FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29084

D. C. Docket No. CA9516

IONE JENKINS,

Plaintiff-Appellee,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

*Appeal from the United States District Court for the Northern District of Georgia*

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

June 30, 1971

Issued as Mandate: OCT. 4, 1971

AIII—1

IN THE

# UNITED STATES COURT OF APPEALS

## FOR THE FIFTH CIRCUIT

No. 29084

IONE JENKINS,
Plaintiff-Appellee,

versus

GENERAL MOTORS CORPORATION,
Defendant-Appellant.

*Appeal from the United States District Court for the Northern District of Georgia*

*ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC*

(Opinion June 30, 1971, 5 Cir., 1971, ___ F.2d ___).

(September 24, 1971)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## CERTIFICATE OF SERVICE

I, Robert B. Troutman, counsel to Petitioner, hereby certify that I have made service of the foregoing Petition for Writ of Certiorari by depositing three copies of same in the United States Mail with sufficient postage affixed thereto, and addressed to counsel for the Respondent:

Claude Ross
Ross & Finch
3417 First National Bank Bldg.
Atlanta, Georgia 30303

Thomas Odom
Attorney at Law
Millen, Georgia

George W. Fryhofer
Attorney at Law
Waynesboro, Georgia

I further certify that all parties required to be served have been served.

This _____ day of December, 1971.

ROBERT B. TROUTMAN
2500 Trust Company of Georgia
Atlanta, Georgia 30303
*Counsel for Petitioner*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-820

GENERAL MOTORS CORPORATION,
Petitioner
v.
IONE JENKINS,
Respondent

## RESPONSE AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1971

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NO. .....

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GENERAL MOTORS CORPORATION,
Petitioner

v.

IONE JENKINS,
Respondent

---

# RESPONSE AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent IONE JENKINS hereby responds to and submits this her Brief in opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as follows:

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on June 30, 1971, reported at 446 F. 2d 377 (5th Cir. 1971) appears in Appendix I hereto. No opinion was rendered by the District Court for the Northern District of Georgia.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1971. (App AII) A timely petition for rehearing and rehearing en banc was denied on September 24, 1971. The denial of the petition for rehearing and rehearing en banc appears as Appendix III hereto.

Respondent agrees that Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

This response and brief is timely filed pursuant to the provisions of Rule 24 of the Rules of this Court.

## QUESTIONS PRESENTED

Respondent notes the questions presented in Petitioner's Petition for a Writ of Certiorari and will comment on them later in the presentation of Respondent's argument and citation of authorities as to why the Writ should not be granted.

## STATUTES INVOLVED

Respondent acknowledges that the statutes claimed by petitioner to be involved are correctly set forth in the Petition; however, respondent denies that the same are involved.

## STATEMENT OF THE CASE

The first paragraph of Petitioner's "Statement of the Case" is correctly stated.

Respondent vigorously disagrees with petitioner that there is any question of legal insufficiency of the evidence was wholly sufficient to support the verdict. Respondent likewise disagrees with the Petitioner when Petitioner urges that the verdict was

> "based solely on expert opinion when (a) the opinion is contradicted by the undisputed physical evidence and (b) the jury was required to engage in unrestrained speculation in order to supply missing evidentiary elements necessary to establish the cause of action".

In these assertions, Petitioner is merely rearguing and rehashing the contentions it made throughout the trial and appeal of this case, all to no avail.

The verdict was not based solely on expert opinion, as will be hereafter argued by Respondent, nor was the opinion of Respondent's experts contradicted by the undisputed physical evidence, the opinions of Respondent's experts being in fact supported and corroborated by uncontradicted physical evidence and testimony. Nor was the jury required to engage in unrestrained speculation for there was solid, undisputed evidence upon which the jury was authorized to conclude, as they did, in favor of Respondent, as will hereafter be adverted to in Respondent's argument.

The Petitioner's statement in its "Statement of the Case" to the effect that

> "The dispute turns on the role of court and jury in the federal system when deciding claims arising under state law"

is not warranted in this case, there being no dispute in Respondent's view, the question being solely and simply:

> WAS THERE SUFFICIENT EVIDENCE TO AUTHORIZE THE SUBMISSION OF THE CASE TO A JURY AND TO AUTHORIZE THE SUBMISSION OF THE CASE TO A JURY AND TO AUTHORIZE THE JURY'S FINDING THEREIN?

By way of further amplification of the Statement of the Case, Respondent calls to the Court's attention that the accident which was the subject occurrence of this case, took place within the geographical limits of the State of Georgia and thus the lex loci delicti is the State of Georgia.

## ARGUMENT

Respondent would first in her argument take issue with some glaringly incorrect and misstated portions of the Petition, e.g. at page 9 of the Petition it is asserted that the Fifth Circuit Court of Appeals limited its review of evidence on appeal to the

> " 'evidence and all inferences most favorable to the party against whom the motion [for directed verdict and j.no.v.] is made' . . . thereby rejecting the Boeing rule that 'the Court should consider all of the evidence — not just the evidence which supports the non-mover's case.' *Boeing Co. v. Shipman*, 411 F. 2d at 374 & 375 n. 16".

A reference to Appendix AI-4 of the Petition and of this response and brief shows clearly that such was not the case, but on the contrary that the Fifth Circuit did follow the rule in Boeing when the Fifth Circuit declared,

> "On motions for directed verdict and J.N.O.V. the trial court, and a reviewing court, must view *the* evidence and all inferences most favorable to the party against whom the motion is made."

*Citing Boeing v. Shipman.* The Fifth Circuit obviously followed the rule in Boeing in reviewing all of the evidence and not just that evidence favorable to the non-mover's cause. (Emphasis supplied)

Another such incorrect assertion appears at page 9 of the petition as follows:

> "(2) The scope of permissible jury inferences was expanded from the implicit *Boeing* limitation of those inferences reasonably supported by the evidence to the less restrictive FELA rule which has been recognized as allowing significantly more jury freedom than in common law negligence actions. See *Missouri-K.-T. Ry. v. Hearson, supra,* at 1040; *Boeing Co. v. Shipman,* 411 F. 2d at 371; *Chicago, R.I. & P.R.R. v. Melcher,* 333 F.2d 996, 999-1000 (8th Cir. 1964)."

Once again, a reference to Appendix AI-6 of the petition and of this response and brief shows clearly that the Fifth Circuit cited the cases of *Remington Arms Company, Inc. v. Wilkins,* 38 7F.2d 48, 54, and *American Cyanamid Company v. Fields,* 204 F.2d 151, 153, simply in support of the proposition asserted by the Fifth Circuit, viz.,

> "The jury was not bound by the appellant's evidence, nor forced to accept the testimony of its experts, even if uncontradicted."

that the cases of *Lones v. Detroit, Toledo & Ironton Railroad Co. and Equitable Life Assur. Society of the United States v. Fry* were cited by the Fifth Circuit simply in support of its finding, viz.,

> "The jury was authorized to make reasonable inferences even if some speculation and conjecture was required."

Thus respondent submits there is no departure from the rule in Boeing for the rule in Boeing clearly states that "On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence — not just that evidence which supports the nonmover's case — *but in the light and with all reasonable inferences most favorable to the party opposed to the motion.*" (Emphasis supplied)

Petitioner has also departed from a correct analysis of the opinion of the Fifth Circuit at page 10 of the Petition when petitioner asserts:

> "(3) The standard applied in the instant case was expressed as 'an absence of probative facts to support the conclusion reached by the jury.' This expression is virtually identical to the FELA rule as defined in *Planters and Lavender v. Kurn:* 'A complete absence of probative facts to support the conclusion reached.' Boeing had expressly rejected this standard. *Boeing Co. v. Shipman,* 411 F.2d at 370."

A reference to Appendix AI-6 of the Petition and of this response and brief discloses, without doubt, that the Fifth Circuit, in the use of the language adverted to, was not applying a standard but was merely disagreeing with appellant's contention when the Court said: "We reject

appellant's contention that there was an absence of probative facts to support the conclusion reached by the jury."

Petitioner, then, at the bottom of page 12 and top of page 13 of its Petition states:

> "Petitioner does not intend to suggest through this petition that the Supreme Court burden itself with review of questions limited to the sufficiency of the evidence to support a verdict."

But the Petitioner says, at page 14 of its Petition:

> ". . . but subsequent cases, including the present one, indicate abandonment of the standard determined there."

(in Boeing) And at page 15 of its petition:

> "It is demonstrable from the record that not even a scintilla of evidence, other than the bare assertions of plaintiff's experts, support the verdict."

So, it is obvious that petitioner is asking this court to "burden itself with review of questions limited to the sufficiency of the evidence to support a verdict".

Petitioner repeatedly argues that respondent's only evidence was the opinions of respondent's expert witnesses and that these opinions were unsupported and contradicted by undisputed physical facts.

By such assertions, petitioner is seeking to transmute by some perverse legal alchemy the base metal opinions of its own experts into gold merely by calling such opinions of its own experts "undisputed physical facts".

The truth is, as the Fifth Circuit noted, in its opinion at Appendix AI-5 of the Petition, and of this response and brief,

> "It all boils down to a battle of experts and, as such, the trial court did not err in submitting the case to the jury."

The Fifth Circuit obviously relied heavily also on the undisputed testimony of respondent herself who was a passenger in the car and that of her host driver, Billy Mixon, that something untoward happened durnig the normal otherwise uneventful operation of the automobile, viz., that it "suddenly veered to the left and became uncontrollable," and that respondent and her said host driver, Billy Mixon, were the only eyewitnesses to the occurrence. (See opinion of the Fifth Circuit in Appendix A1-2 of the Petition and of this response and brief). Surely such uncontradicted eye-witness testimony of the respondent and of her host driver cannot be equated with petitioner's assertions that the opinions of respondent's expert witnesses were unsupported and contradicted by undisputed physical facts.

The Circuit Courts of Appeal undoubtedly have manifested a contrariety of opinions in applying the standard to be applied in determining the legal sufficiency of the evidence to authorize submission of a case to the jury and to support the jury's findings in a case. However, this court has consistently declined to intervene with the grant of Certiorari. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Mercer v. Theriot*, 377 U.S. 152 (1964).

This Court, apparently, has concluded that as long as the rule in *Erie Railroad Co. v. Tompkins*, 304 U.S.

64, 58 S.Ct. 817, 82 L.Ed 1188 is viable in diversity cases, requiring the application of the substantive law of the various states, there is bound to be such contrariety, but without working any injustice to anyone.

This is no case for the grant of Certiorari, Respondent respectfully submits, and urges, for the following key and substantial reasons:

1. Georgia, being the lex loci delicti, in this case, the Petitioner was entitled to no more and no less than accorded to it by the substantive law of Georgia. Petitioner had its rights thereunder throughout the trial of the case in the District Court below. If the substantive law of Georgia had been applied to Petitioner's appeal in the Fifth Circuit, Petitioner would have been confronted with and subjected to the law of Georgia, viz., that the court on appeal would view only such evidence as was favorable to the non-mover's side and giving the non-mover the benefit of all inferences and deductions from such evidence and affirm for the non-mover if there was any evidence at all, i.e. a scintilla, to support the non-mover's case. In determining the question, the evidence must be construed in its light most favorable to the party against whom it was directed. *Everett v. Miller*, 183 Ga. 343, 188 S.E. 342; *Curry v. Robertson*, 87 Ga. App. 785, 75 S.E. 2d 282. Where the evidence may be subject to more than one construction, or where more than one inference may be drawn, even from undisputed facts, the duty of solving the mystery should be placed upon the jury. *Northwestern University v. Crisp*, 211 Ga. 636, 88 S.E. 2d 26. Where there is an evidentiary basis for the jury's verdict, the jury being free to discard or disbelieve whatever facts were inconsistent with their conclusions, it is error for

the court to substitute its conclusions for those of the jury and enter a judgment n.o.v.; and on such a motion, the evidence must be accepted which is most favorable to the party in whose favor the verdict was rendered. *Echols v. Thompson*, 211 Ga. 299, 303, 85 S.E. 2d 423.

2. Petitioner concedes in its Petition, at page 10:

> "Petitioner respectfully submits that the Fifth Circuit adopted the proper rule in *Boeing Co. v. Shipman*, 411 F.2d at 374-75".

Petitioner was given far more rights under the Boeing rule than it would have been given under the Georgia substantive law as to the view of the evidence on appeal, the Boeing rule requiring that *all* of the evidence be reviewed by the court and that there must be a conflict in substantial evidence to create a jury question. Therefore, Respondent respectfully submits that Petitioner is not aggrieved in any respect and has been afforded full justice in the premises.

3. The verdict and judgment in this case has received the imprimature of the distinguished District Trial Judge, of an affirmance by the Fifth Circuit Court of Appeals and of a denial by the Fifth Circuit of a Petition for Rehearing and a Rehearing En Banc, all of which has afforded, in full, an unquestioned safeguard of all of petitioner's rights in the premises.

4. Petitioner is merely seeking to have this Court review the evidence and determine whether the Boeing rule was applied as is manifest at page 14 of the Petition wherein Petitioner says: "Petitioner contends that the Fifth Circuit took an appropriate step in this direction in its *Boeing en banc* opinion, but subsequent cases, in-

cluding the present one, indicate abandonment of the standard determined there."

5. Petitioner has not shown any important substantial or compelling reason, either as to Petitioner's standing as a litigant, or as to any effect on the public why Certiorari should be granted in this case, but is misusing the procedure of applying for Certiorari in an effort merely to use this case as a vehicle and medium hoping to get this Court to hear a rehashing and reargument of all of petitioner's arguments which have heretofore been wholly rejected by the trial and appellate courts below.

6. The Boeing rule, which Petitioner acknowledges to be the proper rule, was applied in this case in the Fifth Circuit. By the application of such rule, petitioner was afforded more rights than it would have been under any other rule applied by any other Circuit Court of Appeal and, therefore, Petitioner was afforded more rights rather than less rights, has nothing of which to complain in this Court, and even if Certiorari were granted in this Court in this case, there would be a complete absence of effect as to the result in this case in the premises.

## CONCLUSION

Petitioner has not made out a case in its Petition for a Writ of Certiorari sufficient to cause this Court, in the exercise of its sound judicial discertion, to grant the Writ sought as no special and important reasons for the grant of such Writ appear. Petitioner is merely complaining to this Court in its said Petition that it does not like the result it obtained in the trial of this case in the District Court and in the Fifth Circuit and is trying,

on the pretense of straightening out some conflicts in the Circuit Courts of Appeals, to get this Court to grant such Writ after which Petitioner would then try to persuade this Court to re-try its case on appeal. Such is not the office of a Writ of Certiorari and respondent urges this Court not to allow Petitioner such Writ based on the flimsy reasons advanced therefor in its Petition. If this Court grants the Writ of Certiorari in this case, it will open a Pandora's box because there are hundreds of thousands of litigants who are dissatisfied with the results below and would like to have one last shot at it in this highest of all Courts.

WHEREFORE, Respondent prays, submits and respectfully urges this Court to deny Petitioner's said Petition for a Writ of Certiorari.

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## Certificate of Service

I certify that I have served a copy of the foregoing Response and Brief of Respondent upon counsel of record for Petitioner by depositing the same in the United States Mail with sufficient postage affixed thereto, and addressed as follows:

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I further certify that all parties required to be served have been served.

This _____ day of January, 1972.

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## APPENDIX

(Opinion, Judgment and Denial of Rehearing of Court of Appeals)